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BEFORE THE ARIZONA CORPORATION COMMISSION

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IN THE MATTER OF THE PETITION OF
GARKANE ENERGY COOPERATIVE, INC.
FOR A DECLARATORY ORDER

DOCKET NO. E-01891A-09-0377

**STAFF'S RESPONSE TO GARKANE
ENERGY COOPERATIVE, INC.'S
PETITION FOR A DECLARATORY
ORDER**

I. INTRODUCTION

By procedural order dated November 3, 2009, Commission Staff was ordered to respond to Garkane Energy Cooperative's ("Garkane" or "Cooperative") Petition for Declaratory Order that A.R.S. § 40-301, *et seq.*, and A.R.S. § 40-285 do not require the Commission to approve the Cooperative's financings and mortgage encumbrances. A.R.S. § 40-301 *et seq.* and A.R.S. § 40-285 are both applicable to the transactions in question, however, given federal constitutional considerations, the Commission should continue to approach these financing matters on a case by case basis.

While the Commission has disclaimed jurisdiction in certain cases otherwise subject to approval under A.R.S. § 40-301, the Legal Division does not believe that it would be advisable to permanently disclaim jurisdiction with respect to certain entities or transactions. Garkane's case presents some very unique circumstances which were obviously considered when prior opinions were given regarding the non-applicability of A.R.S. § 40-301, not the least of which is the fact that 90% of their operations were located in Utah at the time. For this reason, while retroactive approval would appear to be unnecessary for the Cooperative's November 1999 mortgage and security agreement, the December 2003 loan agreement, the October 2007 loan agreement, the April 2009 substitute secured promissory note, and the May 2009 revolving line of credit, future financings should be handled on a case by case basis. Facts change as is evidenced by the fact that the Company this year acquired more territory in Northern Arizona.

1 **II. BACKGROUND**

2 Garkane is a Utah nonprofit cooperative association headquartered in Loa, Utah. Garkane is a
3 public service corporation subject to the jurisdiction of the Commission and the Public Service
4 Commission of Utah ("Utah PSC"). It owns facilities and supplies electricity to its members in both
5 Arizona and Utah. In 1999, more than 90% of its member owners were in Utah. It obtained a CC&N
6 from the Commission in Decision 38446 on April 4, 1966. On May 5, 2009, in Decision No. 70979,
7 the Commission approved the Company's request for an extension of its CC&N to provide service to
8 Colorado City, Arizona. At present, Garkane serves approximately 1400 members in northern
9 Arizona.

10 An issue arose in the CC&N extension case (Docket No. E-01891A-08-0598), as to whether
11 Garkane was required to obtain Commission approval of several financings including a November
12 1999 mortgage, a December 2003 loan agreement, an October 2007 loan agreement, an April 2009
13 substitute secured promissory note, and a May 2009 revolving line of credit. Garkane relies in part
14 upon a conversation it had with the Commission's Chief Counsel in 1999 (See Exhibit D to
15 Garkane's Petition for Declaratory Order) in support of its position that it was and is not required to
16 obtain approval of "debt and lien matters." Garkane also argues that it is a foreign public service
17 corporation engaged in interstate commerce and thus any Commission regulation would create an
18 impermissible burden on interstate commerce in violation of the United States Constitution. Garkane
19 further states that its debt and loan transactions are regulated by the Utah PSC and in fact all of the
20 transactions at issue in this proceeding have already been approved by the Utah PSC.

21 Traditionally, Garkane has received financing through two entities, the Rural Utilities Service
22 ("RUS") and the National Rural Utilities Cooperative Finance Corporation ("CFC"). Company
23 manager Chappell states that the loan and credit facilities provided to Garkane by the RUS and CFC
24 were and/or are secured by standard form mortgages which create liens over all of the cooperative's
25 assets in Utah and Arizona, including assets acquired after the financing is extended.

26 Decision No. 70979 ordered Garkane to file this petition concerning the Commission's
27 jurisdiction over Garkane's debt financing under A.R.S. § 40-301 *et seq.*, and its debt-related
28 encumbrances under A.R.S. § 40-285. Garkane filed a Petition for Declaratory Order to confirm that

1 it is not required to obtain Commission approval of financings under A.R.S. §§ 40-301 *et. seq.* and
2 40-285 because it is a foreign public service corporation engaged in interstate commerce. In the
3 alternative, Garkane requests retroactive Commission approval of the notes, loan agreements,
4 mortgages and line of credit referenced above.

5 III. DISCUSSION

6 A. On Its Face, A.R.S. §§ 40-301 And 40-302 Would Apply To Garkane's Issuance Of 7 Securities And Evidences Of Indebtedness.

8 A.R.S. § 40-301(A) provides that "the power of public service corporations to issue stocks and
9 stock certificates, bonds, notes and other evidences of indebtedness, and to create liens on their
10 property located within this state is a special privilege, the right of supervision, restriction and control
11 of which is vested in the state, and such power shall be exercised as provided by law and under rules,
12 regulations and orders of the commission." Subpart B provides that "[a] public service corporation
13 may issue stocks and stock certificates, bonds, notes and other evidences of indebtedness payable at
14 periods of more than twelve months after the date thereof, only when authorized by an order of the
15 commission."

16 In 1971, this statute was amended through the addition of subpart (D) which provides: "The
17 provisions of this article shall not apply to foreign public service corporations providing
18 **communications** service within this state whose physical facilities are also used in providing
19 **communications** service in interstate commerce."

20 Thus, on its face, the statute is applicable to the issuance of stocks and bonds by Garkane.

21 1. **Garkane's reliance upon Attorney General Opinion 69-10 is misplaced.**

22 Attorney General Opinion 69-10 was issued in response to a request by Charles D. Hadley,
23 Executive Director of the Commission, to the following question: "Must a public service corporation
24 doing business in the State of Arizona comply with the requirements of A.R.S. § 40-302 in issuing
25 stocks and stock certificates, bonds, notes and other evidences of indebtedness payable at periods of
26 more than twelve months after the date of issue when such corporation is a foreign corporation and is
27 also engaged in interstate commerce with an intrastate operation?" Based upon an analysis of the
28 case law from several jurisdictions, the Attorney General concluded that a foreign corporation

1 engaged in interstate commerce need not secure the consent or approval of the Arizona Corporation
2 Commission to issue stocks and stock certificates, bonds, notes and other evidences of indebtedness.
3 The Attorney General's Opinion relied upon a series of cases from other jurisdictions which
4 effectively found that the power given to a commission to approve or disapprove the issuance of
5 stocks and securities necessarily would affect the utilities' interstate activities, for if the company
6 could not secure funds through the sale of its stocks and securities, its continued existence might be
7 jeopardized. See Ag. Op. at p. 6.

8 However, the Arizona Attorney General Opinion relied upon by Garkane was issued in 1969,
9 two years before A.R.S. § 40-301 was amended to exempt foreign public service corporations
10 providing **communications** service within the state whose physical facilities are also used in
11 providing **communications** service in interstate commerce. In addition, the Attorney General
12 Opinion was based upon a version of the statute where the Legislature's intent was unclear: "where
13 the language of a statute is sufficiently broad to include within its provisions foreign corporations, it
14 was not to be presumed that the legislature intended to give the commission such power, and in the
15 absence of plain indications to the contrary, such statutes applied only to domestic corporations." *Id.*
16 at p. 7.

17 One might presume given the proximity between the Attorney General Opinion and the
18 addition of subpart (D) to the statute that the Arizona Legislature acted at least in part in response to
19 the Attorney General's Opinion. What is clear is that the Legislature intended through the addition of
20 subpart (D) to exempt only those foreign public service corporations engaged in providing both
21 intrastate and interstate **communications** service from its provisions.

22 Further, there has been no order of any Court finding that the statutory scheme provided for in
23 A.R.S. § 40-301 *et, seq.* is unconstitutional. Absent such a finding, it could certainly be argued that
24 public utilities must comply with the statute's provisions. Finally, Attorney General opinions are not
25 binding. They are opinions of the Attorney General only.

26 Moreover, it could be argued that Commission approval in and of itself would not constitute a
27 burden on interstate commerce. If that approval actually interfered with the company's ability to
28 conduct business or if conditions were placed upon the issuance of any securities that interfered with

1 the company's ability to issue securities, then a stronger constitutional argument could be made that
2 the Commission's exercise of its authority in that instance would constitute a burden on interstate
3 commerce. No such issue is posed by this case.¹

4 **2. The precedent relied upon by the Applicant does not expressly consider**
5 **the statutory amendment.**

6 Garkane also relies upon certain decisions of the Commission disclaiming jurisdiction where
7 the foreign public service corporation was engaged in interstate commerce. See, for example,
8 Decision No. 51727 (January 16, 1981)²; Decision No. 52244 (June 18, 2081)³; Decision No. 53560
9 (May 18, 1983)⁴; and Decision No. 61895 (August 27, 1999).⁵

10 However, in at least one of those cases, the Applicant Citizens, relied upon the fact that it was
11 providing interstate communications services as well. ⁶ In the other cases, while the applicants were
12 providing either gas or electric service or both, none of those cases expressly considered the
13 Legislature's amendment to the statute in 1971 which expressly exempted only those foreign public
14 service corporations engaged in the provision of both intrastate and interstate communications
15 service.

16 **B. A.R.S. § 40-285 Was Not The Subject of The Attorney General's Opinion Or The**
17 **Prior Commission Decisions Cited By The Applicant.**

18 The Applicant, Garkane, also seeks a ruling from the Commission that A.R.S. § 40-285 does
19 not apply to foreign public service corporations engaged in interstate commerce at least with respect
20 to the corporation's financings and mortgage encumbrances.

21 A.R.S. § 40-285(A) provides as follows:

22 A public service corporation shall not sell, lease, assign, mortgage or
23 otherwise dispose of or encumber the whole or any part of its railroad,
24 line, plant, or system necessary or useful in the performance of its

25 ¹ But see, footnote 8, *infra*.

26 ² *In the Matter of Citizens Utilities Company Issuing Up to An Aggregate of \$35,000,000 of Unsecured Promissory Notes with a Final Maturity No Later Than January 29, 1982*, Docket No. E-1032-80-263.

27 ³ *In the Matter of the Application of Southern Union Company for Authority to Issue and Sell (A) the Company's Cumulative Preferred Stock with an Aggregate Stated Value Not to Exceed \$35,000,000 and/or (B) (The Company's Unsecured Funded Debt, An Aggregate Principal Amount of Not to Exceed \$50,000,000.* Docket No. U-1240-81-120.

28 ⁴ *In the Matter of the Application of Southwest Gas Corporation for Declaratory Adjudication that the Commission is Without Jurisdiction over Southwest Gas Corporation's Securities Issues*, Docket No. U-1551-82-263.

⁵ *In the Matter of the Petition of PHASER Advanced Metering Services, A Division of Public Service Company of New Mexico, For a Declaratory Order*, Docket No. E-03653A-99-0356.

⁶ Decision No. 51725 at p. 2.

1 duties to the public, or any franchise or permit or any right thereunder,
2 nor shall such corporation merge such system or any part thereof with
3 any other public service corporation without first having secured from
4 the commission an order authorizing it so to do. Every such
5 disposition, encumbrance or merger made other than in accordance
6 with the order of the commission authorizing it is void.

7 The purpose behind § 40-285 clearly differs from the purpose underlying the Legislature's
8 enactment of A.R.S. § 40-301 *et. seq.* Section 40-285 was intended to prevent a utility from
9 disposing of resources devoted to providing its utility service, thereby "looting" its facilities and
10 impairing its service to the public. *See American Cable Television, Inc. v. Arizona Public Service*
11 *Co.*, 143 Ariz. 273, 693 P.2d 928 (App. 1983).

12 The Attorney General's Opinion discussed above did not apply to A.R.S. § 40-285 at all nor
13 did the prior Commission opinions relied upon by Garkane. In one of those opinions, Decision
14 No. 61985 (PHASER), the Applicant only sought confirmation that the provisions of § 40-285(A) did
15 not apply to assets not necessary or useful in the performance of the Company's duties as a public
16 service corporation. *Id.* at p. 2. But that was the extent of the discussion on A.R.S. § 40-285.

17 However, if the Commission does decide to disclaim jurisdiction under § 40-301 *et. seq.* in
18 some instances based upon the facts in each case (See Section D below), a similar disclaimer with
19 respect to a related encumbrance under § 40-285 may be appropriate. This should be a case by case
20 determination, however.

21 **C. The Commission Should Continue To Approach This Issue On A Case By Case**
22 **Basis.**

23 The Commission's jurisdictional analysis has consistently been based on federal
24 constitutional grounds – not the statutory exclusion. Specifically, citing the Opinion of the Arizona
25 Attorney General and multiple state courts, the Commission has recognized that its regulatory
26 supervision over the financings of foreign public service corporations who are engaged in interstate
27 commerce could "create an impermissible burden on interstate commerce in violation of the United
28 States Constitution." Decision No. 51727 at 3; Decision No. 52244 at 4; Decision No. 53560 at 3;
and Decision No. 61895 at 2.

While a state does have the authority over essentially local concerns of foreign utilities
engaged in interstate commerce within its state, its authority only extends to the point where its

1 regulations do not impose an undue burden.⁷ A statute like § 40-301 *et seq.*, which provides for the
2 power to approve or disapprove an issuance of securities, or the right to raise money, has the potential
3 of controlling the financial foundation of a utility and consequently its continued operation.⁸ Further,
4 if more than one state has the power to approve or disapprove a single transaction, the "possibility of
5 conflict, or dual regulation, may be sufficient to curtail powers sought to be asserted by an individual
6 State over interstate commerce where such commerce might be impeded by conflicting and varying
7 regulations."⁹ But, as discussed earlier, the Commission has not taken any action which would result
8 in an impermissible burden on interstate commerce or which even threatens to at this time.

9 Interestingly, Garkane does not argue that the Utah PSC's exercise of approval authority over
10 these transactions constitutes an impermissible burden on interstate commerce. In fact, the
11 Cooperative uses the Utah PSC's oversight over these transactions as a reason for the Arizona
12 Commission to disclaim jurisdiction.

13 Garkane presents a unique situation in that at one time approximately 90% of its
14 members/owners were located in Utah. This may be sufficient reason, combined with federal
15 constitutional concerns, to disclaim jurisdiction over financing transactions of the Cooperative.
16 Certainly, these are the types of circumstances and facts that would have been considered by the
17 Commission's Legal Division in rendering any earlier opinions on the applicability of § 40-301 *et*
18 *seq.* to foreign public service corporations providing gas or electric service in interstate commerce.
19 Nonetheless, while we believe it appropriate for the Commission to grant Garkane's Petition with
20 respect to the financings referenced in its Application, facts change as is evidenced by the
21 Cooperative's acquisition of new service territory in Northern Arizona. Thus, a disclaimer with
22 respect to all financings transactions and related encumbrances in the future under A.R.S. §§ 40-301
23 *et seq.* and 40-285 is unlikely to be appropriate.

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27 ⁷ *Panhandle Eastern Pipeline Co. v. Public Utilities Comm'n*, 56 Ohio St.2d 334, 339, 383 N.E.2d 1163 (1978)

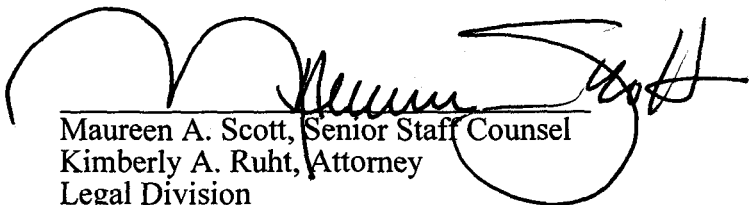
28 ⁸ *Panhandle* at 383 and *State Utilities Comm'n v. Southern Bell Telephone and Telegraph Co.*, 288 N.C. 201, 209, 217 S.E.2d 543 (1975).

⁹ *Southern Bell Telephone* at 212.

1 IV. CONCLUSION

2 The Commission should continue to apply A.R.S. § 40-301 *et seq.* on a case by case basis.
3 Given the unique circumstances in this case, the Commission should grant Garkane's petition for
4 declaratory order and confirm that A.R.S. § 40-301 *et seq.* and § 40-285 did not apply to Garkane's
5 secured loan transactions referenced in its Petition. Future financing and related encumbrance
6 applications by Garkane must be reviewed by the Commission on a case by case basis.

7 RESPECTFULLY SUBMITTED this 23rd day of November 2009.

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10 
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